

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

ANDREW CAINION

Petitioner,

v.

CITY OF BAINBRIDGE ISLAND,

Respondent.

CASE NO. 10-3-0013

ORDER ON MOTION TO DISMISS

THIS Matter comes before the Board on the City of Bainbridge Island's Motion to Dismiss the Petition for Review (PFR) in its entirety.¹ Petitioner Cainion filed a response objecting to the motion and asserting the PFR is properly before the Board for consideration.²

I. DISCUSSION AND ANALYSIS

Cainion owns a parcel of land within the City of Bainbridge Island which is designated as Open Space Residential (OSR) and adjacent to Island Center, a designed Neighborhood Service Center. In February 2010, Cainion filed an application to amend the land use designation to Neighborhood Service Center along with textual amendments to two comprehensive plan policies. On August 25, 2010, with the passage of Resolution 2010-33, the Bainbridge Island City Council denied the proposed amendments. Subsequently, Cainion filed a PFR with this Board asserting various violations of the Growth Management Act (GMA), RCW 36.70A.

¹ City of Bainbridge Motion to Dismiss Petition for Review, filed November 22, 2010

² Cainion's Response to City's Motion to Dismiss, filed December 3, 2010

1 Bainbridge Island asserts the action taken by its City Council – the denial of an application
2 for a comprehensive plan amendment - should be dismissed because the Board has no
3 jurisdiction to hear an appeal challenging a decision that does not adopt or amend a
4 comprehensive plan or development regulation.³ Bainbridge Island relies not only on two
5 provisions of the GMA, RCW 36.70A.280(1) and .290(2), to support this but also several
6 cases dismissing appeals based on denials.⁴
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8 While Bainbridge Island is correct in that the Board has previously stated it generally does
9 not have the authority to review denials of proposed amendments, exceptions to this rule do
10 exist. Namely, the Board may review the denial of a comprehensive plan amendment when
11 by such a denial the jurisdiction fails to fulfill an expressed, explicit mandate – either from
12 the GMA or the City's own Comprehensive Plan.⁵
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15 Cainion expressly concedes that his PFR “is a challenge to the 2004 adoption of the City’s
16 Comprehensive Plan” but contends it is meritorious because the Comprehensive Plan calls
17 for a subsequent action to be taken via the “Special Planning Areas Process” for
18 Neighborhood Centers, specifically Land Use Policy LU-1.9.⁶ According to Cainion, this
19 special planning process, which has not yet been completed for Island Center, extends the
20 appeal period until the process is complete thus allowing him to challenge a land use
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24 ³ City Motion, at 4.

25 ⁴ City Motion at 5-6 citing *Cole v. Pierce County*, CPSGMHB Case No. 96-3-0009, FDO (July 31, 1996)(No
26 authority to review denial of proposed amendment which amounted to a challenge on a 1994 adoption);
27 *Torrance v. King County*, CPSGMHB Case No. 96-3-0038, Order on Motion (March 31, 1997)(No authority to
28 review denial as was a challenge to a land use designation made years before and was, therefore, time-
29 barred); *Bidwell v. City of Bellevue*, CPSGMHB Case No. 00-3-0009, Order on Motion (July 14, 2000)(No
30 authority to review a decision not to docket a plan amendment); *Harvey v. Snohomish County*, CPSGMHB
31 Case No. 00-3-0008, Order on Motions (July 13, 2000)(No duty to adopt proposed amendment); *SR9/US2*
32 *LLC v. Snohomish County*, CPSGMHB Case No. 08-3-0004 (April 9, 2009)(Without a duty to amend, a
decision to docket is within local jurisdiction's discretion).

⁵ See e.g. *Orchard Reach v. City of Fircrest*, CPSGMHB Case 06-3-0019, Order of Dismissal at 5 (July 6,
2006); *Tacoma v. Pierce County*, CPSGMHB Case 99-3-0023c, Order of Dismissal (March 10, 2000); *Port of*
Seattle v. Des Moines, CPSGMHB Case 97-3-0014, Final Decision and Order (Aug. 13, 1997).

⁶ Cainion Response, at 4-6.

1 designation made years ago and the recent denial of his proposed amendment.⁷ Cainion
2 argues that based upon language in Policy LU 1.9 it is reasonable and logical that the
3 identified process would be followed and completed.⁸ Cainion asserts this planning
4 process, specifically for Island Center, was started but not completed due to limited staff and
5 financial resources.⁹

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7 Thus, the primary question for the Board is whether the denial of Cainion's proposed
8 amendments fails to fulfill an obligation made in Bainbridge Island's Comprehensive Plan in
9 regards to Special Planning Areas.¹⁰ The Board can find nothing in the Record or in the
10 Comprehensive Plan itself that gives a clear mandate and/or definite timeline, as suggested
11 by Cainion, to complete studies related to Neighborhood Service Centers identified in Policy
12 LU 1.9. While there is language in this Policy, such as, "[T]he Special Planning Area
13 process *would* include property owners and neighborhood participation and *may* include
14 mediation as a means to resolve significant issues *if* directed by the City Council",¹¹ the
15 Board views the language as merely stating a desired objective and not creating an
16 obligation to complete the work by a time certain. The language does show intent, but
17 without directional language such as "shall," the language does not set forth a mandatory
18 obligation that could provide a basis for Board review. Therefore, the Board finds and
19 concludes that Bainbridge Island's Comprehensive Plan did not establish a duty upon which
20 Cainion's alleged GMA violations could be founded.
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24 In addition, the GMA is clear in that all PFRs must be filed within 60 days from publication of
25 the challenge action.¹² Based on Cainion's own concession and the characterization
26 presented in the PFR and briefing, his challenge is to a land use designation adopted in
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29 ⁷ Cainion Response, at 4-5

30 ⁸ Cainion Response, at 4

31 ⁹ Cainion Response, at 6

32 ¹⁰ In his responsive briefing, Cainion did not assert that the GMA established an obligation.

¹¹ Policy LU 1.9 (Emphasis added)

¹² RCW 36.70A.290(2)

1 2004. As stated above, without a demonstration of an expressed mandate for a subsequent
2 non-discretionary action, the Board can only conclude that Cainion disagrees with the
3 original designation but did not challenge that designation when originally enacted and
4 cannot now challenge that designation collaterally by challenging Bainbridge Island's denial
5 of Cainion's proposed amendment. The GMA's statutory appeal period expressly prohibits
6 such an appeal.
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8 Based on the above, the Board finds and concludes that Cainion's challenge is untimely and
9 that Bainbridge Island was not required to adopt Cainion's proposed amendments.
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11 Therefore, the Board lacks jurisdiction to hear such an appeal and the Board grants
12 Bainbridge Island's Motion to Dismiss.
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14 II. ORDER

15 Based upon review of the GMA, Board's Rules of Practice and Procedure, briefing and
16 exhibits submitted by the parties, case law and prior decisions of the Board and having
17 deliberated on the matter, the Board enters the following Order:

- 18 1. The City of Bainbridge Island's Motion to Dismiss is **GRANTED**.
- 19 2. The Petition for Review in the *Andrew Cainion v. City of Bainbridge Island* is
20 **DISMISSED**.
- 21 3. CPSGMHB Case No. 10-3-0013 is **CLOSED**.

22 DATED this 7th day of January, 2011.
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26 Dave Earling, Board Member
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2 Margaret Pageler, Board Member

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5 William P. Roehl, Board Member

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8 Pursuant to RCW 36.70A.300 this is a final order of the Board.

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10 Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the date
11 of mailing of this Order to file a petition for reconsideration. The original and three
12 copies of a motion for reconsideration, together with any argument in support
13 thereof, should be filed with the Board by mailing, faxing, or otherwise delivering the
14 original and three copies of the motion for reconsideration directly to the Board, with
15 a copy to all other parties of record. Filing means actual receipt of the document at
16 the Board office. RCW 34.05.010(6), WAC 242-02-240, and WAC 242-02-330. The filing
17 of a motion for reconsideration is not a prerequisite for filing a petition for judicial
18 review.

19 Judicial Review. Any party aggrieved by a final decision of the Board may appeal the
20 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for
21 judicial review may be instituted by filing a petition in superior court according to the
22 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil
23 Enforcement. The petition for judicial review of this Order shall be filed with the
24 appropriate court and served on the Board, the Office of the Attorney General, and all
25 parties within thirty days after service of the final order, as provided in RCW
26 34.05.542. Service on the Board may be accomplished in person or by mail, but
27 service on the Board means actual receipt of the document at the Board office within
28 thirty days after service of the final order. A petition for judicial review may not be
29 served on the Board by fax or by electronic mail.

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31 Service. This Order was served on you the day it was deposited in the United States
32 mail. RCW 34.05.010(19).